Supreme Court, U.S.
FILED
071571 MAY 28 2008
OFFICE OF THE CLERK

No. (1)

In The Supreme Court of the United States

ALEXIS FUENTES,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

Record Number _____

PETITION FOR WRIT OF CERTIORARI

Petitioner, **ALEXIS FUENTES**, by counsel, respectfully prays that a writ of certiorari issues to review an order entered in this proceeding by the Supreme Court of the Commonwealth of Virginia on February 28, 2008.

QUESTIONS PRESENTED

1. Whether procedural Due Process required that the Petitioner should have been permitted a hearing in which he could present evidence to establish the factual errors he claimed were the basis for the relief he sought in the nature of *Coram Vobis*?

2. Whether collateral concurrent claims remediable by other procedural mechanism such as ineffective assistance of counsel and actual innocence, prevent the court from considering a Writ of Error Coram Vobis?

PARTIES TO THE PROCEEDING

Petitioner:
Alexis Fuentes
Counsel: William E. Hassan (counsel of record)
VSB No. 18077
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(703) 243-7552

Respondents:
Commonwealth of Virginia
Counsel: Richard Trodden (counsel of record)
VSB No. _____
Commonwealth's Attorney for
Arlington County, Virginia
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Table of Contents

		Page
1.	Questions Presented	1
2.	Parties to the Proceeding	2
3.	Table of Contents	3
4.	Table of Authorities	4
5.	Opinions Below	6
6.	Jurisdiction	6
7.	Constitutional and Statutory Provisions	7
8.	Statement of the Case	7
9.	Reasons for Granting the Petition	9
10.	Conclusion	13

Appendix Documents

1. Final Order from The Virginia Supreme Court dated February 28, 2008 App. 1

2. Final Order from the Circuit Court of Arlington County, *nunc pro tunc* to the July 13, 2007 with Bill of Exceptions App. 2

Table of Authorities

PAGE

THE UNITED STATES CONSTITUTION

U.S. Const. amend. V 10

U.S. Const. amend. XIV 10

FEDERAL CASES

United States Supreme Court

Herrera vs. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) 10

Matthews vs. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed 2d 18 (1976) 10

United States vs. Morgan, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954). 11

United States vs. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) 10

STATE CASES

Virginia Supreme Court

Blowe vs. Peyton, 208 Va. 68, 155 S.E. 2d 351 (1967)..... 13

Dobie vs. Peyton, 198 Va. 762, 96 S.E. 2d 747 (1957) 11

Neighbors vs. Commonwealth, 274 Va.503, 650 S.E. 2d 514 (2007) 11

FEDERAL STATUTES

28 U.S.C. § 1257(a) (2001). 6

STATE STATUTES

Virginia Code § 8.01-677 10 n.1

STATEMENT PURSUANT TO RULE 14.1(d)

The opinion rendered by the Supreme Court of the Commonwealth of Virginia was rendered on February 28, 2008 and is not reported but included in the Appendix. The opinion rendered by the Arlington County Circuit Court *nunc pro tunc* to the 13th day of July, 2007 authored by the Honorable William Newman, included in the Appendix retyped but not reported.

JURISDICTION

This Court may take jurisdiction pursuant to 28 U.S.C. § 1257(a) (2001), which section confers subject matter jurisdiction upon this Court for the review of final judgments by the highest court of the state in which the case was pending.

The Arlington County Circuit Court entered a final order dismissing Petitioner's cause *nunc pro tunc* to July 13, 2007, sustaining a Motion to dismiss made orally by Respondents. The Supreme Court of the Commonwealth of Virginia affirmed the lower court's decision on February 28, 2008.

This Court has jurisdiction due to the following reasons: (1) the Supreme Court of Virginia upheld the dismissal of Petitioner's causes of action without taking evidence or otherwise providing a full and fair hearing in violation Petitioner's procedural due process right to a full and fair hearing under the 5th Amendment to the United States Constitution, as applied to the States by the 14th Amendment to the United States Constitution; (2) this Court has jurisdiction under 28 U.S.C. § 1257(a) (2001).

Constitutional and Statutory Provisions

U.S. Const. Amend. V

U.S. Const. Amend. XIV

28 U.S.C. § 1257(a) (2001)

Virginia Code § 8.01-677.

STATEMENT OF THE CASE

I. CRIMINAL CASE

On or about March 21, 1996 Petitioner was arrested for an alleged violation of Virginia Code § 18.2-154, as amended, in Arlington County and then, was indicted on the same charge on June 17, 1996. There was a written plea agreement, in English, reducing the charge to assault and battery. On October 7, 1996, with no interpreter present, the Petitioner appeared in the Circuit Court for Arlington County. Whereupon the written plea agreement for a plea of guilty to the lesser included crime of assault and battery was tendered and accepted by the Court. The Court then sentenced the defendant twelve (12) months jail with all but thirty (30) days suspended for one year upon the petitioner's release from jail. No appeal was taken. The conviction places the Petitioner, a permanent resident, in a deportable status

II. PETITION FOR WRIT OF CORAM VOBIS

On or about the 21st day of February 2007 Petitioner filed his Petition for Writ of *Coram Vobis,* by Counsel, with supporting affidavits. The Petition, the supporting affidavits and stipulation of facts alleged as follows in pertinent part:

In Arlington County, on or about March 21, 1996, the Petitioner was arrested for allegedly throwing a beverage can at a occupied motor vehicle in violation of Va. Code § 18.2-154, on or about October 1, 1995. Petitioner alleges that he is a native of Bolivia, who, in 1996, "spoke only broken or heavily accented English and he could barely read and comprehend English." Nevertheless, at no time beginning with the date of Petitioner's arrest, including the review and signing of the Plea Agreement, and culminating in the disposition of the charges against him was an interpreter provided for the Petitioner by the police, the Court or his counsel. Moreover, counsel failed to interview or advise Petitioner, failed to investigate the case and failed to follow-up on forensic testing.

During the spring of 2006, Petitioner learned the charges against him had arisen when an individual with animus against him named Janet Calderon paid the complaining witness to make wholly false allegations against him to the Arlington police.

Petitioner sought vacation of his conviction through *Coram Vobis* on the grounds of procedural factual errors, to wit:

a. The conviction was procured upon evidence, which the Court, and co-incidentally the Commonwealth, mistakenly believed, but which was the product of actual fraud and malicious subornation of the testimony of the complaining and other witnesses by a third party, Janet Calderon, while the Petitioner is actually innocent of the crime;

b. The conviction was allowed to occur because the Court erroneously presumed that Petitioner received the effective assistance of counsel, while actually counsel failed to investigate, to follow through on forensic testing, to interview the Petitioner or witnesses or to assure the presence of interpreters

at interviews and at court hearings.

The Petition for Writ of *Coram Vobis* came on for hearing on May 2, 2007 before the Honorable William T. Newman, in the Circuit Court of Arlington County. Whereupon witnesses were sworn, and a Rule on witnesses was issued. Prior to the taking of evidence, the Commonwealth orally moved to dismiss the proceedings for "want of jurisdiction." The Commonwealth's motion was premised upon the assertion that as a matter of law, the Court was without jurisdiction to hear and determine a Petition for Writ of Coram Vobis, which is based to any degree on ineffective assistance of counsel or actual innocence and newly discovered evidence. After argument on the Commonwealth's motion, without taking evidence, the Court dismissed the Petition for Writ.

The Petitioner timely moved for reconsideration of the Court's prior summary dismissal of the Petition for Writ. The Court granted the reconsideration, but after briefing and argument, the Court reaffirmed its previous denial of the Petition for Writ. Petitioner thereafter noted his appeal to the Supreme Court of Virginia which Court dismissed the appeal finding "no reversible error" on the 28th day of February, 2008.

Reasons for Granting the Petition

I. STATE ACTION WHICH DEPRIVES A PERSON OF LIFE, LIBERTY OR PROPERTY MUST BE IMPLEMENTED IN A FAIR MANNER.

The concept of "procedural" due process, as embodied by the Fifth Amendment, and as applied to the states by the Fourteenth Amendment, requires that state action which deprives a person of life,

liberty, or property be fairly implemented. *Herrera vs. Collins,* 506 U.S. 390, 436, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993); *United States vs. Salerno,* 481 U.S. 739,746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *Matthews vs. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed 2d 18 (1976).

The Petitioner has a property interest in his reputation and criminal record, as well as a property and liberty interest in his status as a permanent resident which are placed in jeopardy by this erroneous misdemeanor conviction. The refusal of the trial court and the Virginia Supreme Court to give him a hearing on the facts deprives him of his liberty and property without the minimal procedural due process requirement of a full and fair hearing.

II, IN VIRGINIA, CORAM VOBIS IS A STATUTORY REMEDY WHICH LIES TO CORRECT ERRORS OF FACT NOT APPARENT ON THE RECORD, AND OF SUFFICIENT IMPORT TO PREVENT RENDITION OF JUDGMENT, IF KNOWN.

In Virginia *Coram Vobis* is a statutory remedy, and exists as a means to modify or vacate judgments.[1] In its most recent examination of this traditional writ, the Virginia Supreme Court limited the use of the writ, to correcting "clerical errors" and certain errors of

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1 Virginia Code § 8.01-677, as amended. "For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error *coram vobis*, the same may be reversed or corrected on motion, after reasonable notice, by the court."

fact. *Neighbors vs. Commonwealth*, 274 Va.503, 650 S.E. 2d 514 (2007).

For an error of fact in Virginia to be the basis of a Petition for Writ of Error *Coram Vobis,* it must be an error of fact:

1. Which is not apparent on the record;

2. Which is not attributable to negligence on the part of the Defendant; and

3. Which if known by the Court would have prevented rendition of judgment. . *Neighbors, supra; Dobie vs. Peyton*, 198 Va. 762, 769, 96 S.E. 2d 747, 752 (1957)

That Court also held that *Coram Vobis* cannot lie, if the facts were known at time of trial and defendant failed to produce them. *Neighbors, supra.* Its function is not to present newly discovered evidence or newly arising facts. *Neighbors, supra; Dobie, supra.* It is an action more analogous to a motion for a new trial on grounds existing but not known at the time of trial. *Dobie,* 198 Va. At 769, 96 S.E.2d at 752; *See, United States vs. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954)

Petitioner alleged errors of fact[2] which go to the central integrity of the judicial system. As alleged it was not newly discovered evidence in that it is not direct evidence but rather collateral to the charges

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2 Petitioner did not allege "clerical errors." The facts raised by the Petitioner are, first, that the prosecution was based upon and was the product of actual fraud and malicious subornation of the testimony of the complaining and other witnesses by a third party, while the Petitioner is actually innocent of the crime and in fact no crime took place. This fact, although not a newly arising fact, was not known by either the prosecution or the Petitioner until the spring of 2006, nine years after the conviction.

affecting the underlying character of the adjudication. The error is not apparent on the record, but without doubt, if known by the court it would have prevented rendition of judgment. Thus Petitioner contends that if he had been given due process of law by the trial court hearing his evidence, as matter of law that court would have concluded that the facts he alleged meet the test of factual errors correctable by *Coram Vobis*.

III. THE EXISTENCE OF CLAIMS REMEDIABLE BY OTHER PROCEDURES DOES NOT PRECLUDE CORAM VOBIS.

The other error of fact was the presumption that Petitioner had received effective assistance of counsel, normally ineffective assistance of counsel is redressable by *Habeas Corpus*. However this error in reality merely compounded the first error. Therefore, as a result of the first factual error raised by the Petitioner, despite the Commonwealth's argument to the contrary, the case at bar is distinctly different from a Writ of *Habeas Corpus* for ineffective assistance of counsel, or a plea of actual innocence, which coincidentally would lie if not time barred.

It is true that Coram Vobis did not lie for ineffective assistance of counsel in *Blowe vs. Peyton*, 208 Va. 68, 155 S.E. 2d 351 (1967), however, the court in that case made a factual finding and held that Blowe was not prejudiced by counsel's inefficacy, if any, since he had failed to adduce any evidence that he had not had a fair and impartial trial. *Blowe,* 208 Va. at 75, 155 S.E. 2d at 357. It should be noted that Blowe was given the opportunity to present evidence.

Thus the fact that ineffective assistance of counsel and actual innocence exist concurrently with other cognizable errors of fact does not preclude

jurisdiction to hear and grant a Writ of Error Coram Vobis. Therefore the Petitioner's Petition for Writ of Error Coram Vobis should not have been dismissed summarily, but rather he should have been permitted to present evidence to support his claim.

Further, if Petitioner factually established the claimed fraud and subornation existed and was the foundation of the prosecution, that error of fact is the kind of such error for which Coram Vobis lies. Moreover it is such a paramount error that it threatens the violence to the fabric of the judicial system and cries out for remedy.

CONCLUSION

WHEREFORE, the premises considered, your Petitioner prays that this Court will grant unto him a Writ of Certiorari in this cause and reverse and remand this cause to the trial court for hearing on the merits, together with such other and further relief as may be just and proper..

Respectfully submitted,

ALEXIS FUENTES

By

William E. Hassan
(counsel of record)
VSB No. 18077
2007 North 15th Street
Suite #100
Arlington, Virginia 22201
(703) 243-7552

No. (2)

5/28/08

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APPENDIX

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Counsel for Petitioner

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Record Number _____

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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1. Final Order from The Virginia Supreme Court dated February 28, 2008

2. Final Order from the Circuit Court of Arlington County, *nunc pro tunc* to the July 13, 2007 with Bill of Exceptions

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the city of Richmond on Thursday *the* 28th *day of* February, 2008.

Alexis Fuentes, Appellant,

Against Record No. 071896
Circuit Court No. 2007-000234-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

Patricia L. Harrington, Clerk
By: /s/
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

Alexis Fuentes,	:	
	:	
Complainant,	:	
	:	
v.	:	Case No.
	:	07-000234-00
Commonwealth Of Virginia,	:	
	:	
Defendant.	:	
	:	

FINAL ORDER

THIS CAUSE CAME TO BE HEARD upon the Motion of the Complainant herein to reconsider its prior ruling in this cause of May 2, 2007, upon the Memoranda of Law submitted, upon review of the transcripts of *Commonwealth vs. Fuentes,* upon the motion of the Commonwealth to deny the relief by *Coram Vobis*, preliminarily, and upon argument of counsel without the taking of evidence; and

UPON CONSIDERATION WHEREOF, it appearing to the Court that, for the reasons stated in open Court, as is set forth in the transcript of this proceeding and that of the prior hearing on the aforesaid date, , the Petition for Writ of *Coram Vobis* should not be granted; and, it is, therefore,

ADJUDGED, ORDERED and DECREED that the Petition for Writ of *Coram Vobis* should be and hereby is ordered dismissed, with prejudice.

ENTERED *nunc pro tunc* to the 13th day of July, 2007.

/s/
William T. Newman,
Judge

We Ask For This:

/s/
Jay Burkholder, Esq.
Richard Trodden, Esq.
Commonwealth Attorney for Arlington County
Courthouse, Fifth Floor
1425 N. Courthouse Road
Arlington, VA 22201

Seen And Objected To On The Grounds Set Forth In The Attached Bill Of Exceptions And As Stated On The Record:

/s/
Louis A. Bernard
Va. Bar No. 50919
Attorney for Petitioner
LAW OFFICES OF LEWIS AND ASSOCIATES, PC
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VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

Alexis Fuentes,	
Complainant,	
v.	Case No. 07-000234-00
Commonwealth Of Virginia,	
Defendant.	

BILL OF EXCEPTIONS:

Petitioner objects to the aforegoing Order on the following grounds:

1. That as alleged by Petitioner, the recently discovered fraudulent inducement of prosecution by a malicious third party's subornation of perjury put the Court under a burden of a mistake of fact cognizable by Writ of *Coram Vobis,* and which mistake of fact is inimical and repugnant to the administration of justice;

2. That the Court should not have determined the case preliminarily without the taking of evidence; and

3. On account of all such other grounds as are set forth in the pleading, memoranda of law and argument of Counsel.

Alexis Fuentes
By Counsel

/s/
Louis A. Bernard
Va. Bar No. 50919
Attorney for Petitioner

No. _____

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/s/
William T. Newman,
Judge

We Ask For This:

/s/
Jay Burkholder, Esq.
Richard Trodden, Esq.
Commonwealth Attorney for Arlington County
Courthouse, Fifth Floor
1425 N. Courthouse Road
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Seen And Objected To On The Grounds Set Forth In The Attached Bill Of Exceptions And As Stated On The Record:

/s/
Louis A. Bernard
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Attorney for Petitioner
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Alexis Fuentes
By Counsel

/s/
Louis A. Bernard
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Attorney for Petitioner